COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2014-SC-000443-D

REBECCA CLAYBURN — APPELLANT

APPEAL FROM THE COURT OF APPEALS, KENTUCKY
V. **CASE NO. 2012-CA-001680-MR**

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE
AND
COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET,
BOARD OF CLAIMS — APPELLEE

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BRIEF FOR APPELLANT, REBECCA CLAYBURN

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this brief were served upon the following named individuals by first class U.S. mail, postage prepaid, on the 5th day of August, 2015: Samuel P. Givens Jr., Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. G. Mitchell Mattingly, Kentucky Board of Claims, 130 Brighton Park Blvd, Frankfort, KY 40601; and Hon. Marlin Jones, Kentucky Transportation Cabinet, Office of Legal Services, 200 Mero St., Frankfort, KY 40622.

Donald H. Smith, *Counsel for Appellant*

INTRODUCTION

This is an appeal from Appellant Rebecca Clayburn to the Kentucky Court of Appeals Opinion Reversing and Remanding with Directions the Jefferson County Circuit Court's Order which concluded that the Board of Claims committed reversible error by dismissing Rebecca Clayburn's negligence claim against the Transportation Cabinet. The negligence claim arose when Rebecca Clayburn, who was attempting to enter the westbound traffic on the Watterson Expressway, I-264, during a rain storm, at night, was forced off the left side of a merging onramp lane by an unknown driver into a grassy gore area containing hidden construction or remnant steel I-beams and sign material which Rebecca Clayburn's vehicle struck, severely damaging her vehicle and severely injuring her when the I-beam(s) came up through the floor board of her vehicle.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellant Rebecca Clayburn, by counsel, respectfully moves the Court for oral arguments. Oral arguments concerning this matter will assist the Court in clarifying and analyzing the issues presented herein.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts surrounding the underlying litigation in this case arose from an automobile accident that occurred on the Interstate 65 onramp to the Watterson Expressway, I-264 West, Louisville, Kentucky when a phantom driver forced the appellant off of the interstate merge lane an into the grassy "gore" area. On the evening of April 3, 2007, Appellant, Rebecca Clayburn ("**Rebecca**"), her pregnant daughter in the passenger seat, and a friend in the back seat, were travelling in her 2004 Volkswagen Jetta south on Interstate 65 (I-65), and was attempting to merge onto I-264 W. (Hearing Transcript or **H.T.** at 8-9) The ramp to merge from I-65 S to I-264 W is two (2) lanes which merge into one. Left of the left lane is a grassy, triangular strip of land between the ramp and the main body of I-65 S. This area is meant to be delineated by white painted lines, the area inside of the white lines are known as the "gore" area. (**H.T.** at 90-91). The "gore area" is not marked or indicated in any other manner or method. (**H.T.** at 92). **Rebecca** testified at the Hearing that there were not even white painted lines delineating the gore area. (**H.T.** at 64).

Rebecca was traveling in the off-ramp's left merge lane attempting to merge on to the Watterson Expressway (I-264) West. (**H.T.** at 10-12). It was approximately 8:30 p.m., dark, and raining heavily, when an unknown driver of another vehicle, traveling in the right merging lane, suddenly, and without warning, crossed into **Rebecca's** lane nearly crashing into her vehicle and forcing her off of the left side of the ramp and into the "gore" area between Interstate I-65 South and Interstate I-264 West. Id.

Hidden and unseen in the "gore" area, covered by grass, and unmarked in any way were several large steel "I-Beams". (**H.T.** at 14-15). The "I-Beams" which caused

the damage were steel attachment plates and vertical support beams related to the highway sign construction, and which was subsequently learned were the remnants of one or more automobile crashes which **Rebecca** ran into, over and through. Id. As a result of hitting these beams, Rebecca's airbag deployed, one of the beams came up through the floor of the car exiting through the speedometer, while another beam damaged the vehicle's axle and tires. (**H.T.** at 15-16) **Rebecca's** vehicle was determined to be a total loss. (**H.T.** at 14). **Rebecca** suffered injuries to her neck, hands, back, right hip, jaw, and several broken teeth. (**H.T.** at 20).

The Commonwealth of Kentucky Transportation Cabinet (hereinafter **Cabinet**) had knowledge of these I-Beams and other debris being in the "gore" area at least as early as October, 2006, which was nearly six (6) months prior to this accident, and took no steps to remove, repair or warn of this hidden danger. (**H.T.** at 96). The panel sign in this "gore" area had been hit or damaged by motorists on three (3) occasions in the two (2) years prior to **Rebecca's** accident. (**H.T.** at 101). **Rebecca** was seriously and permanently injured as a result of colliding with the steel I-Beams and her ability to labor and earn money was and is seriously impaired.

Rebecca filed a claim with the Commonwealth of Kentucky Board of Claims (hereinafter **Board**) on March 13, 2008. A Hearing was conducted in this matter on October 29, 2010 before the assigned Hearing Officer, the Honorable William J. Rudloff. At this hearing, Rebecca testified to her first-hand account of how the accident occurred. **Rebecca** testified that: She was forced off of the road by another vehicle which veered into her lane without noticing **Rebecca's** car, an account which was corroborated by Rebecca's witness, Nichole Starks, a passenger in the backseat of **Rebecca's** car. On the

night the accident occurred it was raining heavily and dark and Rebecca was unfamiliar with the area, this being the first time that she had traveled on this particular highway at this location When the other car veered into her lane and was obviously going to crash into her car, she believed that the only option for her safety and the safety of her passengers, including her pregnant daughter, was to cut to her left and enter the "gore" area instead of being hit by the other car. **Rebecca** had no forewarning or knowledge of the hidden "I-Beams, as previously stated. **Rebecca** further testified that if there had been some sort of warning or signage indicating that a hazard existed in the "gore" area, i.e. that the I-Beams were placed there, she could have gone into the grass in front of or behind the warning lights, beams, or signage, or could have at least made an informed decision as to what the safest course of action would be, a decision which, according to **Rebecca's** testimony, was taken from her because of the complete lack of warning given that the I-Beams were in the "gore" area grass space.(See Generally, **H.T.** at 5-20).

At the same October 29, 2010 Hearing, the **Cabinet's** witness, Jason Richardson, testified that the "gore" area was marked off with white lines and was not meant to be a traveling lane. (**H.T.** at 91-92). He stated that it was the Cabinet's policy to not identify obstructions in the "gore" area or to warn travelers of any construction material with anything more than a white painted line (**H.T.** at 92). However, Mr. Richardson's admitted that this specific "gore" area was often traveled upon and that the panel sign had been struck by vehicles at least three (3) times between 2005 and 2007, when **Rebecca's** accident occurred. (**H.T.** at 101). Further, he testified that generally "gore" area signs are frequently hit. (**H.T.** at 108). Mr. Richardson also testified as to the **Cabinet's** knowledge of an inspection on October 23, 2006 in which the cabinet discovered that the panel sign

in question had been damaged, roughly six (6) months prior to **Rebecca's** accident. (**H.T.** at 96). The **Cabinet's** policy following an accident is to "leave all the materials lying where they are for evaluation by the contractor and reuse whenever possible." (**H.T.** at 100, line 14-16). Another **Cabinet** witness, Mr. Cary Cassell, who was responsible for supervising the maintenance and grass cutting of the "gore" area, testified that the form contracts he supplies to the mowing contractors states that they are not to move or disturb any ongoing construction project. (**H.T.** at 117). Of course, there was no indication that the subject location was an "ongoing construction project". Mr. Cassell testified that the grass cutting crews would mow around any debris or obstruction and then use a weed eater around the debris to make the area look presentable and uniform. (**H.T.** at 121). If any construction material is found on the road, it is to be retrieved and taken to the maintenance barn, but, as Mr. Cassell testified "if they're off in the grass, we let them lie." (**H.T.** at 127, line 16-17). Through the testimony of its own witnesses, the **Cabinet**, demonstrated a policy in which broken wrecked signs were left in place and obscured through the efforts of the grass maintenance crews, and no effort to alert the public of any hidden obstruction or possible danger, even though there are barriers, flashing lights, or other warning signs which could have been requisitioned and placed to warn travelers such as **Rebecca** (**H.T.** at 102-3). Instead, the hidden wreckage from the sign remained unattended to for nearly six (6) months until **Rebecca** was forced off the road and over it, thereby resulting in her injuries and damages.

On or about November 1, 2010, the Hearing Officer issued a Recommended Findings of Fact, Conclusions of Law, and Recommended Order. In his Finding of Facts, the Hearing Officer found the accident did occur as **Rebecca** described in her testimony,

that **Rebecca** suffered multiple serious injuries because of the collision which caused her to miss work, that the highway "gore" area was properly striped, that the "gore" area was not meant for vehicular traffic, and that construction materials were often left in the "gore" areas. In his Recommended Conclusions of Law, the Hearing Officer relied upon Commonwealth v. Babbitt, 172 S.W.3d 786 (KY. 2005), stating that "the highway authority is not automatically liable every time a motorist drives his [or her] vehicle off the traveled portion of the highway and strikes a roadside hazard", concluding that the **Cabinet** was not the cause of **Rebecca's** injuries and damages and that she was not entitled to a recovery. The Hearing Officer recommended that Rebecca's claim be dismissed with prejudice. (See "Recommended Findings of Fact, Conclusions of Law, and Recommended Order attached as Exhibit "A")

Rebecca filed "Claimant's Exceptions to the Hearing Officer's Recommended Order of November 1, 2010" on December 9, 2010. In her Exceptions **Rebecca** disputed the hearing officer's failure to recognize her testimony of the weather conditions the night of the accident, her unfamiliarity with the area, and that a warning or indication that the I-Beams were in the gore area would have provided her the opportunity to make an informed decision as to the safest course of action available to her under the conditions with which she was confronted. **Rebecca** further disputed the Hearing Officer's failure to recognize Jason Richardson's testimony as it related to the fact there were barricades or other warning devices readily available that could have been utilized to warn the traveling public. Further, **Rebecca** disputed the failure of the Hearing Officer to acknowledge the testimony of Mr. Richardson verifying that the Cabinet had knowledge of the I-Beams in the gore area for nearly six (6) months prior to the crash. As for the

Hearing Officer's Recommended Conclusions of Law, **Rebecca** took exception to the fact that the Hearing Officer did not address the Babbit Court's holding that "[w]hile the failure to erect a barrier might not cause the accident, such a failure might be a substantial factor in aggravation of the injuries and, in that event, with proof of causation and negligence, the State will be liable." Commonwealth v. Babbitt, 172 S.W.3d 786 (KY. 2005). Finally, **Rebecca** disputed the hearing officer's application of the law when he concluded that the conduct of the **Cabinet** was not a causative factor in her accident. (See "Claimants Exceptions to the Hearing Officer's Recommended Order of November 1, 2010" attached as Exhibit "B").

On January 20, 2011, the **Board** remanded the case to the Hearing Officer for further consideration and also ordered the parties to brief the legal issues. (See "Order" attached as Exhibit "C"). **Rebecca** thoroughly briefed the legal issues as required by the Board's Order. (See "Claimant's Brief of Legal Issues Presented in this Claim" attached as Exhibit "D"). The **Cabinet** failed to file a Brief as required by the Order.

A second "Recommended Findings of Fact, Conclusions of Law and Recommended Order" was issued by the Hearing Officer on April 22, 2011 and was nearly identical to the first. The only difference between the two was additional procedural history and three (3) short additional paragraphs in the Conclusions of Law sectrion in which negligence is placed upon the unknown driver. (See "Recommended Findings of Fact, Conclusions of Law and Recommended Order" attached as Exhibit "E"). **Rebecca** filed "Claimant's Exceptions to the Hearing Officer's Recommended Order of April 22, 2015" and the **Cabinet** filed "Respondent's Exceptions to the Hearing Officer's Recommended Order of April 22, 2015" concerning the Hearing Officers

decision to not find for the Cabinet based on sovereign immunity. **Rebecca** filed a Motion to Strike the Cabinet's Exceptions. On June 16, 2011, the **Board** sustained Rebecca's Motion to Strike the Cabinet's Exceptions; however the **Board** accepted and adopted the Hearing Officer's second Recommended Order. (See "Final Order" attached as Exhibit "F").

On July 29, 2011, **Rebecca** appealed the decision of the **Board** by filing a Complaint in Jefferson Circuit Court alleging that the **Board** acted without or in excess of its power; and/or that the award is not in conformity with the provisions of KRS 44.070(2) / 44.160; and/or that the Findings of Fact do not support the award; and/or that the Order in question is not supported by the substantial evidence contained in the record of this action. (See "Complaint" attached as Exhibit "G".) On August 11, 2011, the **Cabinet** filed its Answer to the Complaint. (See "Answer to Complaint" attached as Exhibit "H".) On September 11, 2012, Judge McDonald-Burkman entered the Circuit Court's Order and Judgment holding that "[g]iven the evidence presented through interrogatories, sworn testimony, photographs and tendered documents, the Board lacked substantial evidence before it to render its Final Order. (See "Order and Judgment" attached as Exhibit "I").

The **Cabinet** appealed the Circuit Court Order and Judgment and filed its Brief on April 23, 2013. **Rebecca** filed her Appellee's Brief on June 24, 2013, to which the **Cabinet** filed a Reply Brief. Oral arguments were initially requested by both the **Cabinet** and **Rebecca**. (See Court of Appeals Record). Oral Arguments were scheduled by the Clerk of the Court of Appeals for November 20, 2013 at 3:00 p.m. (See "Notice of Oral Arguments" attached as Exhibit "J"). At that time Counsel for **Rebecca** was experiencing

severe health problems for which he underwent his third (3d) back surgery in October 27, 2013. **Rebecca** filed a Motion for the Continuance of Oral Argument which was granted by Order dated November 15, 2013. The Order states that oral arguments would be "rescheduled at a date, time, and location to be set by further Order of the Court." (See "Order" attached as Exhibit "K").

On January 17, 2014 Counsel for **Rebecca** wrote the Kentucky Court of Appeals Clerk's office requesting the rescheduling of the oral arguments for a time in March, 2014, but received no reply. (See "Letter" attached as Exhibit "L"). Counsel's health problems deteriorated and on April 21, 2014, Counsel underwent a fourth (4th) back surgery. On May 23, 2014 the Court of Appeals rendered an Opinion reversing the Jefferson County Circuit Court Order without having heard oral arguments. ("Court of Appeals Opinion" attached as Exhibit "M"). The Court of Appeals made no motion to dispense with oral arguments, nor did **Rebecca**, the **Cabinet**, or the **Board**. **Rebecca** filed a timely Petition for Rehearing arguing that the Court of Appeals erred when it failed to hold oral arguments or move to dispense with oral arguments pursuant to CR 76.16(1). (See Court of Appeals Record). On July 9, 2014 the Court of Appeals issued an Order Denying the Petition for Rehearing (See "Order Denying the Petition for Rehearing" attached as Exhibit "N").

Rebecca then gave Notice that she would appeal the Court of Appeals Order and filed a Motion for Discretionary Review with this Court on August 6, 2014. The **Cabinet** filed their Response to the Motion for Discretionary Review on September 5, 2014. This Court granted Discretionary Review on May 6, 2015 and Granted a final extension of time for Appellant to file her brief on July 10, 2015.

ARGUMENT

A. THE COURT OF APPEALS ERRED BY NOT HOLDING ORAL ARGUMENTS OR IN THE ALTERNATIVE, BY NOT MOVING TO DISPENSE WITH ORAL ARGUMENT AS REQUIRED BY CR 76.16. (Preserved through the timely filing of a petition for rehearing and the timely filing of a motion for discretionary review.)

The Court of Appeals erred when they failed to properly follow the Kentucky Rules of Civil Procedure. The Court of Appeals is not bound by any party's request for oral argument in their brief, however, if they choose to dispense with oral arguments, any party has a right to file a motion to reconsider. CR 76.12(4)(c)(ii). Both **Rebecca** and the **Cabinet** requested oral argument in their appellate briefs, which the Court of Appeals granted. By granting the requests for oral argument the Court of Appeals in effect bound themselves to hold the oral arguments "*unless* the appellate court directs otherwise on its own motion or on motion of one or more of the parties to the appeal." CR 76.16(1)(emphasis added). **Rebecca** made a motion for continuance of oral argument, which was granted, but no party to this action nor the Court made any motion to dispense with oral arguments.

Rebecca and the **Cabinet** were both deprived of their right to object and file a motion to reconsider within ten (10) days of the motion or order to dispense with oral argument. See CR 76.12(4)(c)(ii) and CR 76.16(1). "No opinion shall be rendered until the time has expired for making such objection and motion for reconsideration, or if such objection and motion is made, until it can be decided." CR 76.16(1). Without a proper motion and order, the Opinion rendered by the Court of Appeals on May 23. 2015 was made in error.

B. THE COURT OF APPEALS ERRED BY HOLDING THAT THE MAINTENANCE AND INSPECTION OF GORE AREAS IS A "DISCRETIONARY" ACT AND NOT A "MINISTERIAL ACT. (Preserved through the timely filing of an appeal to the Court of Appeals and the timely filing of a motion for discretionary review.)

The Court of Appeals erred in holding that maintenance or inspection of the gore area is a discretionary act and not a ministerial act. Under the Board of Claims Act the **Cabinet** has government immunity with regards to discretionary acts, but waives immunity for negligence in ministerial acts. Commonwealth Department of Highways v. Sexton, 256 S.W.3d 29, 32 (Ky. 2008). The test for whether an act is discretionary or ministerial was set out by the Court in Collins v. Commonwealth Natural Resources and Environmental Protection Cabinet, 10 S.W.3d 122, 126 (Ky. 1999). Discretionary acts are "merely routine duties," while ministerial acts "involve policy-making decisions and significant judgment." Id. Regularity of an action does not immediately qualify an act as a discretionary act, and a lack of a specific statute or regulation will not disqualify an act from being construed as a ministerial act. Sexton, 256 S.W.3d at 33.

This Court defined discretionary acts by an officer or employee as one that involves "the exercise of discretion and judgment, or personal deliberation, decision, and judgment. Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001)(citing 63C Am.Jur.2d, Public Officers and Employees, § 322). The Court described a ministerial act as "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. Id.(citing Franklin County v. Malone, Ky., 957 S.W.2d 195, 201 (Ky. 1997). Here, the Court of Appeals, citing Sexton, 256 S.W.3d 29, states that "the inspection and maintenance of the gore area is left to the discretion of employees at the

Transportation Cabinet. This by definition constitutes a discretionary act." (See Court of Appeals Opinion Reversing and Remanding with Directions). However, as the record shows, the employees have no discretion where it comes to the maintenance. Mr. Jason Richardson, a **Cabinet** witness at the October 29, 2010 Hearing, testified that the **Cabinet's** policy after an accident is to "leave all the materials lying where they are for evaluation by the contractor and reuse whenever possible." (See **H.T.** at 100, line 14-16). Another **Cabinet** witness, Mr. Cary Cassell, testified that the Contracts he supplies for the lawn maintenance crew specify that they are to leave any construction material where it lies (**H.T.** at 117). Further, that they were to mow around construction material obstructions. (**H.T.** at 121). These are not the actions of an employee exercising "discretion and judgment", but rather action that "requires only obedience to the orders of others." Yanero, 65 S.W.3d at 522. To find, as the Court of Appeals did here, that department-wide policy is discretionary, would be akin to finding the statutes the legislature enacts are discretionary because our representatives use their discretion in passing legislation.

The **Cabinet** does have a duty to "[i]nvestigate all problems relating to the construction and maintenance of roads in the state." KRS 176.050(1)(a). As stated, in Commonwealth v. Automobile Club Ins. Co., the **Cabinet** also:

> "[...] has a duty to keep [the highway] in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. This includes the duty to erect warning signs and to erect and maintain barriers or guardrails at dangerous places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and others."
> 467 S.W.2d 325, 328 (Ky. 1971).

These duties not only apply to the highway, but to the shoulder of the highway, especially when it comes to "defects which are obscured from the view of the ordinary traveler and are so inherently dangerous as to constitute traps." Dillingham v. Dept. of Highways, 253 S.W.2d 256, 257 (Ky. 1952).

The Court of Appeals in their May 23, 2014 Opinion acknowledged a ministerial duty stating: "The Transportation Cabinet acknowledges its ministerial duty to maintain the roadway but adamantly argues that no such ministerial duty has previously been extended to gore areas alongside the roadway." However, it is undisputed that the **Cabinet** owns and has control of the "gore" area and was aware of the hidden steel I-Beams. This Court has previously said that an act may be ministerial without specific statute or regulation. Sexton, 256 S.W.3d at 33. Kentucky courts have been expanding the ministerial duty of government municipalities concerning roadways for nearly one hundred years. In City of Lancaster v. Broaddus, the city argued that it was not responsible for injuries caused when an automobile turned over while passing another automobile. 216 S.W. 373 (Ky.App. 1919). The street in question was twenty-two (22) feet wide, but only fifteen (15) feet of the street was finished. Id. The automobile was traveling at about ten (10) miles per hour. Id. at 374. When the two automobiles tried to pass, one's right wheels went off the finished portion of the street and dipped into a water culvert causing the vehicle to flip. Id. The city argued that the automobile went off the portion of the road meant to be traveled upon and the city was therefore not guilty of any negligence. Id. The Court of Appeals determined that there was a duty of care to keep, not just the street in a reasonably safe condition, but also parts adjacent to the street. Id. at 375. "We need not in this case say how close to the traveled road the dangerous

excavation or obstruction must be to fix liability on the city. Each case must stand on its own facts." Id. To support their holding the court quoted Thompson on Negligence, vol. 5, § 6055:

> "To make a distinction between cases where the excavation is within the true line of the highway or exactly upon it, and cases where it is beyond it, but close to it, presents an unworthy refinement and a judicial trifling with human life. The existence of such dangerous places although outside the traveled portion of the highway, or even outside the highway itself, may so endanger public travel, unless suitable guards or barriers are erected, as to raise a duty on the part of the municipality to erect such guards or barriers along the margin of the traveled portion of the highway, or even along the external portion of the highway as laid out, so that if a traveler is injured in consequence of a want of such barriers, he may have an action for damages against the municipality, although the injury in fact took place outside the limits of the traveled path."
> Id. at 376.

The holding and principle of the Broaddus court was used to criticize the decision in Dillingham v. Dept. of Highways for finding that the state is only liable for a hidden "inherently dangerous" situation or a "trap" on the shoulder. Falender v. City of Louisville, 448 S.W.2d 367, 369-70 (Ky. 1969). Instead, there is a ministerial duty for a condition that is not reasonably safe on the shoulder of the highway. Id. at 370. The Court also made note that in the 50 years since Broaddus was decided automobile traffic conditions in cities have become far more complex and dangerous. Id.

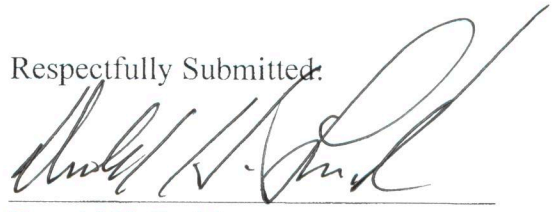
While the **Cabinet** was correct that no ministerial duty has yet been applied to the gore area of highways, Kentucky Courts have a long history of expanding the duty in which the State or municipality must provide travelers a reasonably safe area in which to travel. In the case at hand, it is undisputed that **Rebecca** was forced off of the road by an unknown phantom driver. It is also undisputed that the **Cabinet**, more than knowing about an unsafe condition which was in the gore area, actually purposely created the

hidden trap through their department-wide policy. Regularly inspecting the gore area for broken signs does not make that inspection a discretionary act. *See* Sexton, 256 S.W.3d at 33. While there is no specific statute or regulation that states in plain language that the Cabinet has a ministerial duty to inspect and maintain "gore" areas for the safety of the traveling public, specific statute or regulation is not a prerequisite for an act to be deemed ministerial. Id. Kentucky cases like Broaddus, Dillingham, and Falender illustrate a long history of judicial willingness to protect the public from unsafe conditions on and around Kentucky's streets and highways and periodically expand that protection when changing times demand it. This judicial protection should be applied to the "gore" areas connected to the highways, making the **Cabinet's** inspection and maintenance of the "gore" areas a ministerial act.

CONCLUSION

For the foregoing discussion and case law support, as well as good common sense, the Court should remand this case to the Court of Appeals with instructions to schedule and hold oral arguments; or, in the alternative, hold that the **Cabinet** has a ministerial duty to inspect and maintain the "gore" areas connected to our highways and overrule and reverse the Court of Appeals Order and to remand this case for further proceeding consistent with this Court's Opinion, including the determination of damages for the Appellant.

Respectfully Submitted:



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